IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

MONDAY, THE 19TH MARCH 2007 / 28TH PHALGUNA 1928

RSA.No. 836 of 2003(G)

AS.613/1998 of ADDL.DISTRICT COURT, THRISSUR
OS.1908/1996 of MUNSIFF COURT, THRISSUR
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APPPELLANT/APPELLANT/PLAINTIFF

SARLA W/O. KADAVIL THILAKAN,
ARANATTUKKARA VILLAGE, DESOM, THRISSUR TALUK.

BY ADV. SRI.DILIP J. AKKARA

RESPONDENTS: RESPONDENTS/DEFENDANTS
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1. **P.P.MUHAMMED S/O.PAVVATHUMPARAMBIL POKKU MURIYAMKODU DESOM, VALAPPAD VILLAGE, CHAVAKKAD TALUK, PRESENT ADDRESS, P.P.MUHAMMED, P.B.NO.30418, DOHA, KHATHAR.**

2. **SURESH S/O. KARAYIL VELAYUDHAN, EDAMUTTOM DESOM, VALAPPAD VILLAGE, CHAVAKKAD TALUK.**

ADDL. R3 AND R4 IMPLEADED:

R3: A.A.ASHRAF, S/O ALI, ALENGATTUKARAN HOUSE, MALA DESOM, KURUVILASSERY VILLAGE, MUKUNDAPURAM TALUK, REPRESENTED BY POWER OF ATTORNEY HOLDER K.B. RAJAN, KOZHIPARAMBIL HOUSE, EDAMITTAM P.O., VALAPPAD VILLAGE, CHAVAKKAD TALUK.

R4: K.B. RAJAN, KOZHIPARAMBIL HOUSE, EDAMITTAM P.O., VALAPPAD VILLAGE, CHAVAKKAD TALUK.

ADDL. RESPONDENTS 3 AND 4 ARE IMPLEADED AS PER ORDER DATED 5.10.06 IN I.A. 2296/04.

BY ADV. SRI.B.K.PURUSHOTHAMAN
SRI.C.CHANDRASEKHARAN

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 19/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N. KRISHNAN, J.

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R.S.A. NO. 836 OF 2003

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Dated this the 19th day of March, 2007.

J U D G M E N T

This second appeal is preferred against the concurrent findings of two Courts and is preferred against A.S.613/98 of the Additional District Judge, Thrissur. The brief facts necessary for the disposal of the appeal are stated as follows. It is the case of the plaintiff that she is the owner of 95 cents of property. Her father had incurred a loan of Rs.20,000/- from the first defendant and as the property belonging to the father was encumbered as a security for the loan of Rs.20,000/-, the plaint schedule property was given. The first defendant took the plaintiff and the father to the Varanda of the Sub Registrar's office and without reading or understanding, were forced to sign the document and thereafter they were also directed to sign the document before the Registrar without understanding the contents of the document. The property having an extent of 95 cents had been sold for Rs.12,500/- and in fact this value shows the fraud on the transaction. Really, the first defendant had misrepresented and

cheated the plaintiff and her father and had made the document to be executed. It is also contended that the plaintiff has not parted with the possession of the property and it is lying as a contiguous property along with the property of the father and therefore seeks for a declaration to set aside the document.

2. The second defendant contested the suit before trial court. The first defendant had transferred the property to the second defendant and it is contended that the document is supported by consideration and it is only an out and out sale and it is not a mortgage or security as contended by the plaintiff and therefore it is not liable to be set aside on one or any of the grounds mentioned in the plaint. Now, it is contended at the second appellate stage that the matter has been compromised between the 2nd defendant and the plaintiff. But it is worthwhile to note that as early as in 1999, the 2nd defendant had parted with the property in favour of one Ashraf for a consideration of Rs.22,000/- and the power of attorney holder of Ashraf has filed an impleading application I.A.2296/04 to get himself impleaded in the second appeal and prosecute the matter. When a person has parted with the property and has executed an assignment deed in his favour and the purchaser comes forward, he has to be heard

for the reason that his interest has to be protected especially when there is some doubt about the attitude of the 2nd defendant towards his purchaser. Therefore, the impleading petition stands allowed.

3. Both the courts have elaborately considered the entire materials available and held that the document is a sale deed and there are no grounds to set aside the sale deed and therefore dismissed the suit. It is against that decision the present second appeal is preferred. The learned counsel for the appellant had raised the following questions of law in the memorandum of appeal:

> "(1) Can a photocopy of a copy of a document be taken to evidence?
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> (2) Are not surrounding circumstances like extreme inadequacy of sale consideration, coupled with non delivery of possession of the property in question and of the original sale deed or the basic documents sufficient to proof that the parties never intended the document to be a sale deed?; particularly in the light of the decision of the Division Bench of Oudh High Court in Parshotham Das v. Yar Ali (AIR 1928 Oudh page 439 at 441) and that of the Calcutta High Court in "Jogendra V Manmatha"(34 I.C. 106-Cal)?

(3) The Hon'ble Supreme Court in "Uday Chand Dutt v. Saibal Sen" (AIR 1988 SC 367) has held that the true test of the character of a document is the intention of the parties. Has the courts below erred in not considering this principle of law?

(4) The Hon'ble Supreme Court in "Bishundeo Narain Rai v. Anmol Devi" (AIR 1998 SC 3006) has held that interest in property do not pass with just the execution and registration of the sale deed, when the intention of the parties as gathered from other attending circumstances is contrary. Has the courts below failed to consider this principle of law as laid down by the apex Court?

(5) Were not the courts below therefore under the circumstances mistaken in not appreciating or considering the available evidence to determine the true intention of the parties?

(6) Ought not have the courts below drawn the apparent presumption that neither the original of Ext.B2 sale deed nor possession were handed over to the 2nd respondent by the 1st, and therefore the transaction between them was not a true sale nor intended to be one such?"

Points:

4. The first question of law is whether the photocopy of a document can be taken as evidence. It is the photocopy that has been marked. The learned counsel would contend that only photocopy of the sale deed executed by the plaintiff in favour of the first defendant is produced. At this stage of the proceedings I am not inclined to entertain the same as the plaintiff had not raised any such contention and as there is no dispute regarding the execution of the document.

5. The most important and the only question to be considered in this case is regarding the document executed by the plaintiff in favour of the first defendant. A certified copy of the said document is produced before Court. It is the definite case of the plaintiff that she herself and her father was misled and defrauded by the first defendant in executing Ext.B2 document. A reading of the judgment of the Court below would reveal that the plaintiff as well as her father were literate and they were able to understand the consequences of their action and further they had executed previous documents and that had been produced before Court. So, the pretension of ignorance regarding the document cannot be believed at all.

6. The definite contention which is elaborately pleaded in the plaint is regarding the fact that the first defendant without giving any time fraudulently led them to the Veranda of the Sub Registrar's office, made them forcefully sign the document without even permitting them to read and the same process repeated when they were asked to sign the document before the Registrar as well. The Registrar as well as the scribe who prepared the document had been examined before the Court.

7. I will first refer to the evidence of DW2, the Sub Registrar who had registered the document. He had deposed before Court that he had asked the parties regarding the execution of the document. He would further depose that he had explained to them what is the document and had read over the same to them and only after admission of the parties had registered the document. Though he had been seriously cross-examined nothing is elicited to prove it otherwise. DW3 is the scribe who prepared the document. He had an experience of 30 years in that field. He had deposed before Court that the father of the plaintiff had approached him and he had written document No.2195/91 and the materials for executing the document was furnished by the plaintiff and that it is an assignment deed. He

has also deposed that before signing the document from the Varanda of the Sub Registrar's office it was read over to her and thereafter consideration was paid and the father signed the document as a witness. So, evidence of DW2 establishes the fact that the document was presented at the instance of the plaintiff and her father. It was read over to them, they received the consideration and the Sub Registrar in the discharge of his official duty had asked them about the execution, made the contents of the document known to them and thereafter had registered the document. Therefore, the evidence of DW2 and DW3 would clearly establish that the plaintiff had executed the document only after fully knowing the contents of the document.

8. The Appellate Court had referred to the evidence of PWs.1 to 4 in this case. It is pointed out that the demand for Rs.20,000/- was made on 5.11.91 and the document was registered on 6.11.91 and it was at that time there was a demand for executing the document. The purchaser of the stamp paper would show that the stamp papers had been purchased in the name of the first defendant as early as on 4.11.91, i.e., one day in advance of the proposed transaction, according to the plaintiffs, had taken place. This also cuts at the root of the plaintiffs' case.

9. Now, the learned counsel for the appellant had produced the original of the document executed by her in favour of the 1st defendant. It has to be stated that under O.41 Rule 27 additional documents can be produced and received in evidence, if the party in spite of best diligence was not able to produce the document or had come into the possession of the said document after the disposal of the case. But, in this case even from the date of registration of the document it is the case of the plaintiff that they had been in possession of the document. So, non-production of the document at the earlier stage would show that what is stated by the plaintiff is not correct for receiving the document. Therefore, the said document cannot be looked into. It has also to be stated that if the document has been taken back by the father of the plaintiff and it had been in the custody of the plaintiff and her father from the date of receipt of the document after the registration, it is too difficult to believe that they would not have opened the document and read the document to understand whether it was an assignment deed or a security. Most probably, it was to overcome this difficulty they did not produce that document at the stage of evidence. Therefore, all the circumstances regarding the execution stares against the

plaintiff and it is only to be held that her case cannot be accepted.

10. Now, I will refer to the decisions referred to by the learned counsel for the appellants. The learned counsel had relied on the decision of the Apex Court reported in ***Vidhyadhar v. Mankikrao (AIR 1999 SC 1441)***. He had referred to paragraph 37 which is as follows:

> "The real test is the intention of the parties. In order to constitute a "sale," the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in praesenti or in futuro. The intention is to be gathered from the recital in the sale deed, conduct of the parties and the evidence on record. "

11. A perusal of the facts would reveal that it was a case where a document was executed and there was a contention or stipulation in the document when the entire amount was returned before a particular date the property would be given back to the defendant No.2. Or one can hold that it was a conditional sale with a right to re convey, if the amount is paid within a stipulated time. So, the evidence that was gathered from the document made it explicitly clear that if the seller tenders back the amount before the stipulated time, the purchaser has to reconvey the

property to the seller. But, in the case before me there is no such stipulation and the document is to be characterised as an out and out sale and not a conditional sale or a mortgage by conditional sale. Therefore, the said decision would not come to the rescue of the appellant in this case.

12. The next decision cited by the learned counsel for the appellant is ***Bishundeo Narain Rai v. Anmol Devi (AIR 1998 SC 3006).*** The learned counsel had relied on the passage in paragraph 11 which says that,

> "It follows that on execution and registration of a sale deed, the ownership title and all interests in the property pass to the purchaser unless a different intention is either expressed or necessarily implied which has to be proved by the party asserting that title has not passed on registration of the sale deed. Such intention can be gathered by intrinsic evidence, namely, from the averments in the sale deed itself or by other attending circumstances subject, of course, to the provisions of Section 92 of the Evidence Act. "

13. The case before me would prima facie indicate that by tenure of the document is an out and out sale. The possession is an ingredient that can be looked into and the enjoyment of the property is normally done by effecting mutation to the property.

It is submitted before me that after the purchase by the present person who wants to get himself impleaded as a party to the second appeal, the basic tax had been paid by him. The Court below had also stated that the mere non-existence of a separating boundary between the plaintiff's property and her father's property will not be a substantial material to show that the document was not a sale deed but only a mortgage deed. The terms of the document makes it crystal clear that what is intended is an out and out sale. So the contention of the appellant cannot be accepted.

14. Then, the learned counsel for the appellant very strongly contends before me that for an extent of 95 cents of property, the consideration shown is only Rs.12,500/- and it is grossly inadequate. I had gone through the present assignment deed executed by the 2nd defendant in favour of 3rd defendant in the year 1999 where the consideration shown is only Rs.22,000/- and nothing more. When a property is conveyed for an amount of Rs.22,000/- in the year 1999 one cannot hold that the consideration of Rs.12,500/- is absolutely inadequate in 1991. However, inadequacy of consideration always cannot be considered to be a sole criteria for coming to the conclusion that

the transaction is not true. It is only one of the circumstances. So from the materials available it has to be held that the case of the appellant cannot stand the scrutiny of law.

15. Lastly, in this case, as the Apex Court had laid down in the decision reported in **Gurdev Kaur v. Kaki (AIR 2006 SC 1975)** that the second appellate Court shall not act as a third trial Court on facts and further that it should not be another dice in the gamble. So, there are limitations for this Court and even construing that different view is possible on fact, the second appellate Court is not entitled to substitute its views for the concurrent finding of facts of the Court below. So, all the substantial questions of law are answered against the appellant and the second appeal lacks merit and it is dismissed without costs. I make it clear that if the parties want to settle the matter, disposal of this case will never stand in their way. It is also made clear that no settlement can be arrived at without the impleaded party in the second appeal.

M.N. KRISHNAN,
JUDGE.

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